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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HABTAMU LEMMA,

Defendant and Appellant.

D073689

(Super. Ct. No. SCD268585)

APPEAL from a judgment of the Superior Court of San Diego County,  
Timothy R. Walsh, Judge. Affirmed.

Gregory L. Rickard, under appointment by the Court of Appeal, of Defendant and  
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Senior Assistant Attorney General, Kristine A. Gutierrez and  
Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Habtamu Lemma pled guilty to one count of kidnapping. (Pen. Code,<sup>1</sup> § 207, subd. (a).) The court sentenced him to the upper term of eight years in prison, as well as lifetime registration as a sex offender. (§ 290.006.) It also ordered restitution and various fees and fines. Lemma appeals, contending the court erred in awarding a sentence at the upper term rather than at the middle. He further contends the court improperly sentenced him to lifetime registration because it erred in determining the kidnapping was conducted for sexual gratification. Finally, in supplemental briefing, Lemma seeks a stay of the restitution fines until the prosecution proves his ability to pay them, and he requests we strike the remaining assessments, fees, and the restitution payment for the Sexual Assault Response Team exam.

Lemma's contentions fail because he forfeited his challenge to the length of sentence and the court properly applied aggravating factors. Additionally, there was sufficient evidence to conclude Lemma conducted the kidnapping for sexual gratification, and trial counsel failed to object at sentencing to challenge the fines and fees imposed.

### BACKGROUND AND PROCEDURAL FACTS

In January 2016, Angela G. traveled to San Diego for a work conference with her 13-year-old daughter, Jane Doe. Around 2:16 p.m. on January 11, Jane Doe texted her mother at the conference that she was going to the mall, which was immediately next door to their hotel. Jane Doe received texts from her mother at 4:08 p.m. and 5:39 p.m., but she did not reply. At 8:24 p.m., Angela received a text from Jane Doe that read, "I'm

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<sup>1</sup> Further section references are to the Penal Code.

okay, I'm just lost." Angela contacted police who attempted to track Jane Doe's whereabouts by her phone; police were unsuccessful.

At 11:15 p.m. Jane Doe's phone was used to call 9-1-1. The call was made by Lemma, who reported a female had taken his phone, and he was in his vehicle waiting for police contact. Police eventually found Jane Doe the following morning. Jane Doe initially said she got lost and spent the night in the park, and Jane Doe and her mother returned home to Ventura on January 14.

Once home, Jane Doe told her boyfriend and a friend that she had been raped by three men while visiting San Diego. Her mother contacted local police. Jane Doe told police she took an ecstasy pill and started to walk around downtown. There, she was followed by three men in a red sedan. Jane Doe initially reported the men grabbed her and forced her into the vehicle, then drove about 20 minutes away, parking in an alley. Later, she acknowledged that she could not remember how she came to be in the vehicle. The men forced her to drink alcohol and struck her in the face if she refused to drink.

Once in the alley, the men pulled Jane Doe from the vehicle and told her not to move or they would kill her.<sup>2</sup> There, each man raped her. The driver penetrated her vagina with his fingers and his penis, then placed his penis in her anus. The second man penetrated Jane Doe's vagina with his penis. The third man penetrated her vagina with

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<sup>2</sup> Codefendant Qaybdid Mohamed told police Jane Doe performed oral sex on him in the car. Lemma's attorney stated Lemma had no knowledge that sexual contact occurred between Mohamed and Jane Doe in the backseat of his car while he drove.

his fingers and his penis; he also placed his penis in her anus. None of the men ejaculated.

After the men sexually assaulted Jane Doe, Lemma drove to codefendant Qaybdid Ahmed Mohamed's apartment complex, where Mohamed raped Jane Doe again in his parents' apartment while Lemma waited in the parking lot. During this time, a female reached into Lemma's car and took his cell phone, so Lemma searched the apartment complex until he found Jane Doe, then he used Jane Doe's cell phone to call 9-1-1 to complain about the theft.

A Sexual Assault Response Team (SART) exam conducted by a forensic nurse on January 16 found petechiae and bruising on Jane Doe's hymen and labia, a healing laceration on the anal verge, and light bruising and scratches on Jane Doe's neck and upper back. A doctor conducting a second analysis of the SART exam found no scarring and no evidence of a healing laceration on the anal verge. However, the doctor concluded the findings were consistent with Jane Doe's explanation of suffering a rape with blunt force, penetrating trauma.

Jane Doe's clothes contained Lemma's DNA from a sperm sample found on the rear external waistband. Lemma denied having any sexual contact with Jane Doe, contending the DNA was transferred from the seat of his vehicle, where he had masturbated at some point in the past.

In August 2016, Jane Doe reported to police that she was certain the assailants saw her middle school and California identification cards because they were in a prominent

location in her backpack, and the men had gone through her backpack, taking money and property.

Lemma was charged with three counts: kidnapping for child molesting, with a special allegation the victim was under 14 years of age at the time of the commission of the crime (§§ 207, subd. (b), 208, subd. (b); count 1); lewd act upon a child under age 14 (§ 288, subd. (a); count 2); and kidnap (§ 207, subd. (a); count 3), which was added by stipulation. Lemma pled guilty to count 3, and the court dismissed and struck counts 1 and 2. At the hearing on his plea, Lemma confirmed that he understood he could be mandated to register as a sex offender for life as a consequence of his plea.

The original probation report recommended the middle term for kidnapping and recommended lifetime sex offender registration. The supplemental probation report incorporated additional information from Jane Doe and Angela and identified as a potential aggravating factor that Lemma "occupied a position of leadership," which the prosecution argued compelled a sentence at the upper term. (Cal. Rules Court, rule 4.421(a)(4).)

The mitigation report included letters of support from members of Lemma's community, and 35 or 36 people attended the sentencing hearing to show their support. The report from psychologist David P. DeFrancesco provided a risk assessment for Lemma, relying on two risk measures, the Static-99R for sexual recidivism,<sup>3</sup> and the

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<sup>3</sup> The Static-99R assigns a score, "then use[s] rates and percentiles associated with the score to provide information about the risk that the subject will commit a sex offense in the future." (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 390.)

COMPAS for general recidivism. Lemma received a five on the Static-99R, which identified an above-average risk of 15.2 percent chance of being charged with a sex crime within five years of release; the COMPAS score indicated a low risk for general recidivism. Dr. DeFrancesco wrote that Lemma's score should be viewed cautiously because it was based on conflicting information and assumed a sexual act had occurred. Lemma's attorney argued there had not been any evidence of sexual contact that had been pled and proved. He requested no registration as a sex offender or, in the alternative, registration for a period shorter than lifetime.

At the sentencing hearing, the court heard victim impact statements from Jane Doe and Angela, which were also included in the supplemental probation report. Jane Doe told the court the men made her feel dirty, used, ruined, and inhuman. Her mother reported that Lemma threatened Jane Doe with a knife, told Jane Doe she was filthy and dirty, and that no one would look for her—not even her mother.

The prosecutor argued aggravating circumstances warranted imposition of the upper term. The sentencing statement identified as aggravating factors that Lemma engaged in violent conduct (Cal. Rules Court, rule 4.421(b)(1)), committed a crime that involved the threat of great bodily harm and acts that disclosed a high degree of cruelty (*id.*, rule 4.421(a)(1)), used others to participate in the commission of the crime (*id.*, rule 4.421(a)(4)), committed the crime in a manner that indicates planning and sophistication (*id.*, rule 4.421(a)(8)), and the victim was particularly vulnerable. (*Id.*, rule 4.421(a)(3).) During the sentencing hearing, the prosecutor also argued Lemma was the "driving force" behind the crime, which was violent and included sexual contact.

The court noted Jane Doe's age at the time of the crime and commented it did not find it credible that Lemma took Jane Doe into his car to help her, or that his sperm was on her underwear due to transference. The court recognized some ambiguity in how Jane Doe came to be in Lemma's car, but it did not believe the men were trying to help Jane Doe, commenting, "What person picks up a 13-year-old girl, doesn't call police, doesn't take her to a police station?"

The court described Lemma's behavior as callous, and it explained Lemma had committed a crime regardless of Jane Doe's age because the men took Jane Doe against her will, intoxicated her, and raped her. Although Jane Doe had faced personal challenges that may have situated her differently from other 13-year-olds, the court explained her vulnerability from those experiences may have made the crime worse. The court concluded Lemma's conduct involved a threat of great bodily harm and demonstrated high degrees of cruelty to a particularly vulnerable victim. (Cal. Rules of Court, rule 4.421(a)(1) & (a)(3).) It also was carried out in a manner which suggested some planning and sophistication because Lemma drove the car some distance before arriving at the alley, which provided him the opportunity to make the alternate decision to drive Jane Doe somewhere safe. (*Id.*, rule 4.421(a)(8).) The court found Lemma's conduct to be predatory, and it sentenced Lemma to the upper term, eight years in prison.

The court also concluded there was a nexus between Lemma's actions and the sexual conduct because Lemma took Jane Doe to a place where he raped her. Explaining Lemma's acts were predatory and severe, the court specifically found the need for public

protection, and continued monitoring required sex offender registration. Lemma's attorney objected to the registration requirement.

The court imposed fines, fees, and restitution and entered a restraining order on Jane Doe's behalf. It also ordered Lemma to submit for testing for communicable diseases, as permitted by section 1202.1, subdivision (e)(6)(A)(iii).

Lemma's attorney filed a brief stating no arguable issues could be found, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and we sought supplemental briefing on two issues: (1) whether the application of the upper term was an abuse of discretion, and (2) whether the requirement for lifetime registration as a sex offender was an abuse of discretion. In supplemental briefing, Lemma contends these sentences were an abuse of discretion. We disagree and affirm the trial court's sentence in its entirety.

## DISCUSSION

### A.

#### *Forfeiture and Ineffective Assistance of Counsel*

As a general rule, we are limited to deciding issues that the appellant has preserved for appeal. "In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim."<sup>4</sup> (*People v. Scott* (1994) 9 Cal.4th 331, 351 (*Scott*).) Specifically, "a criminal defendant cannot argue for the first

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<sup>4</sup> Although they have different meanings, "the terms 'waiver' and 'forfeiture' have long been used interchangeably." (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)



time on appeal that the court . . . aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed [Citation]." (*Id.* at pp. 351-352.) The waiver doctrine applies to a court's double-counting a particular sentencing factor or misweighing of factors. (*Id.* at p. 353.) This is because defects in the court's reasons are easily corrected if called to the court's attention at the time. (*Ibid.*)

Here, Lemma concedes defense counsel did not object to the aggravating factors cited by the court during the sentencing hearing. Instead, he argues that the failure to object demonstrates ineffective assistance of counsel, citing *Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).

To demonstrate ineffective assistance of counsel, Lemma must demonstrate his attorney's performance (1) fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defense. (*Strickland, supra*, 466 U.S. at pp. 687-688.) We evaluate counsel's conduct with deference and "indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*People v. Dennis* (1998) 17 Cal.4th 468, 541.) " '[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citation.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*)). "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*Id.* at pp. 266-267.)

Lemma contends there is no satisfactory explanation for trial counsel's failure to object to a prison sentence to the upper term, but he fails to provide a clear argument on this point. Instead, Lemma points to his community support and notes that immediately after failing to object to this sentence, his trial attorney objected to imposition of lifetime sex offender registration. Defense counsel's reasons for failing to object are not clear; absent some declaration or other information for his decision, we must reject this argument on appeal. (*Mendoza Tello, supra*, 15 Cal.4th at p. 266.) Moreover, there is no indication an objection would have been successful, particularly given the court's description of Lemma's actions as callous and cruel and the number of aggravating factors the court identified as applicable, which we discuss more fully below. Thus, Lemma has forfeited the opportunity to challenge the court's imposition of the upper term based on an aggravating factor.

B.

*Aggravating Factors*

Even had Lemma not forfeited his ability to challenge the aggravating factors, here the court's application of them was appropriate. Lemma does not dispute that the court was authorized to impose the upper term, assuming aggravation outweighed mitigation. He only argues that the court abused its discretion in aggravating the sentence, claiming the factors were duplicative, inapplicable, or improperly weighted. We disagree.

The court's discretion to impose the upper term of a sentence relies on application of circumstances in aggravation of the crime. (*People v. Black* (2007) 41 Cal.4th 799,

808 (*Black*); § 1170, subd. (b).) "[T]he existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*Black*, at p. 813, citing *People v. Osband* (1996) 13 Cal.4th 622, 728 (*Osband*).) "No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed." (*Black*, at p. 815.)

"[F]act-specific errors in the court's statement of reasons are not readily susceptible of correction on appeal. The reviewing court cannot substitute its reasons for those omitted or misapplied by the trial court, nor can it reweigh valid factors bearing on the decision below." (*Scott, supra*, 9 Cal.4th at p. 355.) "[A] trial court does not abuse its discretion unless its [sentencing] decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

The court imposed the upper term based on three aggravating factors: (1) planning (Cal. Rules of Court, rule 4.421(a)(8)), (2) vulnerability of the victim (*id.*, rule 4.421(a)(3)), and (3) threat of great bodily harm or acts disclosing a high degree of cruelty. (*Id.*, rule 4.421(a)(1).) We address each aggravating factor in turn.

### 1. *Planning, Sophistication, Professionalism*

First, Lemma challenges the court's reliance on the aggravating factor that the manner of the crime indicates planning, sophistication, or professionalism (Cal. Rules of Court, rule 4.421(a)(8)), contending the kidnapping at issue in this case "was not distinctively worse than an ordinary one." Lemma argues that a sophisticated or professional kidnapper would have separated the victim from her cell phone and would

not have used the victim's cell phone to call police. We are not persuaded by his explanation for why the kidnapping did not demonstrate planning.

Planning can be shown by behavior that demonstrates conduct for a particular purpose. (See, e.g., *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758-1759 (*Forster*) [defendant engaged in planning by driving to Mexico for purpose of drinking alcohol].) There is no indication Lemma hesitated in his actions; he drove Jane Doe to an isolated location, an alley, several miles away. Lemma had time to consider his actions and abandon the kidnapping by taking Jane Doe someplace safe. Instead, he drove Jane Doe to the alley to assault her. Even if the opportunity to take Jane Doe presented itself suddenly, there could still be planning involved in the kidnapping; it was not unreasonable for the trial court to conclude that Lemma's decision to drive Jane Doe to the alley supports a finding of an aggravating factor.

Lemma argues the court used the fact of asportation to find the aggravating factor, which was improper because moving the victim a substantial distance is an element of kidnapping. (Cal. Rules of Court, rule 4.420(d) [cannot impose upper term based on fact constituting an element of offense]; see *People v. Perkins* (2016) 5 Cal.App.5th 454, 464-465 [asportation element includes movement over substantial distance].) However, the movement of a substantial distance from one place to another was not the basis for the finding in aggravation. Instead, the court focused on the alleyway as the destination and on Lemma's opportunity to select a different, safer place to take Jane Doe to conclude there was planning involved in the kidnapping.

## *2. Vulnerability of Victim*

Next, Lemma contends the trial court's analysis of Jane Doe's age was inaccurate and thus improperly applied to show vulnerability as an aggravating factor. (Cal. Rules of Court, rule 4.421(a)(3).) He argues Jane Doe does not fit the court's description of a 13-year-old girl as someone with Dora the Explorer on her backpack who might still be playing with dolls. He asserts Jane Doe was not a typical 13-year-old because she had photos on her cell phone of herself with pierced nipples, and she had suffered previous sexual trauma. In his reply brief, Lemma appears to reframe this argument slightly, labeling the circumstances as unique and arguing the issue was not Jane Doe's age per se, but Jane Doe's specific background and situation. To demonstrate both that Jane Doe's experience was atypical for someone her age and to imply her statements lacked credibility, Lemma points out that Jane Doe had been exposed to drug use in utero, suffered sexual assault at age 11, experienced multiple personalities, experimented with marijuana and ecstasy, and had been hospitalized for suicidal behavior.

Lemma misses the court's point. The court could reasonably conclude, as it did, that Jane Doe's history and background could supply additional evidence of Jane Doe's vulnerability. The cruelty of the crime was exacerbated by Jane Doe's age. The court did not abuse its discretion in drawing this conclusion.

## *3. Threat of Great Bodily Harm or Acts Disclosing High Degree of Cruelty*

Third, Lemma contends the court improperly relied on Jane Doe's and her mother's impact statements to find the additional aggravating factor that the crime involved "threat of great bodily harm[ ] or other acts disclosing a high degree of cruelty." (Cal. Rules of

Court, rule 4.421(a)(1).) Lemma argues the claims of cruelty and reference to a weapon that Angela described in her victim impact statement had not been shared previously with law enforcement; thus, it was an abuse of discretion to rely on the information at sentencing.

The court described the crime as cruel, and Lemma's acts as predatory and severe, against a particularly vulnerable victim, but it is not clear the court relied on the victim impact statements in deciding to sentence Lemma to the upper term. The court commented that the conduct in the case involved the threat of great bodily harm and demonstrated high degrees of cruelty and planning because of the victim's youth and the manner in which the crime was carried out, neither of which was dependent on the victim's or her mother's statements. Nor did the court's conclusion that there was a threat of great bodily harm necessarily rely on the statement that Lemma used a knife.<sup>5</sup> (See, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 165 [threat inferred from evidence victim felt at mercy due to assailant's superior bodily strength].) Whether or not Lemma used a knife to threaten Jane Doe or to encourage the other men to rape her was not central to the court's finding.

Because only a single aggravating factor is required to impose an upper term (*Osband, supra*, 13 Cal.4th at p. 728), even if we were to find merit in Lemma's claim of

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<sup>5</sup> In one of Jane Doe's interviews, she told a police officer that she did not see any of her assailants in possession of any weapons. This contradicted the later victim impact statement, in which Jane Doe's mother shared that Lemma had threatened to kill Jane Doe, showing her a gun and a knife. The court did not reference the knife in its sentencing.

error as to one of them, any such error would be harmless, and no remand would be necessary. (See *Forster*, *supra*, 29 Cal.App.4th at p. 1759.)

C.

*Lifetime Sex Offender Registration*

Lemma contends the court abused its discretion by improperly concluding Lemma kidnapped Jane Doe for the purpose of sexual gratification and because there was insufficient evidence Lemma was likely to reoffend.

Section 290.006, subdivision (c) provides the court with discretion to order registration as a sex offender for any criminal offense which was committed as a result of sexual compulsion or for the purpose of sexual gratification. The court must state its reasons for requiring lifetime registration as a sex offender separate from its finding the offense was committed as a result of sexual compulsion or for the purpose of sexual gratification. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197, overruled on other grounds by *Johnson v. Department of Justice* (2015) 60 Cal.4th 871.) In determining whether to require lifetime registration, the court may consider all relevant information available at the time of sentencing, including the risk of reoffense. (*People v. Garcia* (2008) 161 Cal.App.4th 475, 483, 485, disapproved on other grounds in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4.) In exercising its discretion, "[a] trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

There is ample evidence that there was a nexus between Lemma kidnapping Jane Doe and the sexual conduct to support the trial court's decision here. Although Jane Doe

was already showing signs of intoxication, Lemma still forced her to drink alcohol, and after she was heavily intoxicated, he sexually assaulted her. The DNA sample matched the sperm on the waistband of Jane Doe's underwear to Lemma, establishing sexual contact. Additionally, Lemma drove Jane Doe to the alleyway where the sexual contact occurred. The chain of events for which Lemma was responsible shows his purpose in kidnapping Jane Doe was for sexual gratification. Moreover, this series of events, coupled with the age difference—Lemma committed the crime when he was 23 and Jane Doe was only 13—suggests predatory behavior and supports the court's conclusion that the sex offender registration was necessary for public protection.

Lemma challenges the court's decision by pointing to language in the report from the licensed psychologist submitted with the probation report, which stated that Lemma did not appear to have any sexual compulsions or to have targeted the victim for sexual gratification. Lemma also challenges the use of the Static-99R for determining the risk of recidivism of a sex offense, arguing it was not likely predictive for African-born immigrants when its samples were drawn from Canada, the United States, and western Europe. However, there is no evidence that the Static-99R was inaccurate because it was used for an immigrant, and the court had the opportunity to consider the psychologist's recommendation that the score be used cautiously because Lemma's and Jane Doe's



statements conflicted.<sup>6</sup> Despite this and after considering all the information, the court determined Lemma should register as a sex offender for life; the Static-99R was just one piece of information the court had before it. Accordingly, we find no abuse of discretion in the court's sentencing of Lemma to lifetime registration on the sex offender registry.<sup>7</sup>

D.

*Ability to Pay Assessments and Fines*

1. *Additional Facts*

At sentencing, the trial court sentenced Lemma to financial assessment, fees, and fines totaling \$2,624. This included a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8), a \$154 criminal justice administration fee (Gov. Code, § 29550.1), a \$300 sex offender registration fee (§ 290.3), a \$1,500 restitution fine (§ 1202.4, subd. (b)), and \$600 in restitution to pay for the victim's SART exam (§ 1202.4, subd. (f)). Lemma did not object to any of these financial impositions, and the court did not hold a hearing to consider Lemma's ability to pay.

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<sup>6</sup> The court did not find credible Lemma's claims that he did not have sexual contact with Jane Doe or that he was unaware of any sexual contact between Jane Doe and Mohamed that occurred in Lemma's vehicle while Lemma was driving. We will not second-guess the court's determinations. (See *Dolan v. Buena Engineers, Inc.* (1994) 24 Cal.App.4th 1500, 1504.)

<sup>7</sup> Although Lemma sought registration for some period short of lifetime, the court currently lacks the discretion to order a shorter registration time span. (*People v. Eastman* (2018) 26 Cal.App.5th 638, 648.) However, the Legislature enacted statutes that will permit registration for a period as short as 10 years. (*Id.* at p. 647, fn. 9.) These statutes will become effective in 2021. (*Ibid.*)

In early April 2019, Lemma sought to file supplemental briefing to address the issues raised in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), and we denied the request. In late April 2019, Lemma sought to stay appellate proceedings so he could pursue a motion requesting a hearing on payment of assessments and restitution fines in the trial court. We denied the motion. Also in late April, Lemma filed a motion in superior court to stay the restitution fine and strike the remaining fines and fees based on defendant's inability to pay. The superior court denied this motion.

After receiving a copy of the trial court's order, we requested the parties submit letter briefs regarding the applicability of *Dueñas*.

## 2. *Forfeiture*

Lemma seeks a stay of the restitution fines totaling \$2,100 until the prosecution proves his ability to pay them, and he requests we strike remaining assessments, fees, and the restitution payment for the SART exam. Alternatively, he requests we remand the matter for an evidentiary hearing to determine his ability to pay.

Although the trial court denied Lemma's request on the ground that Lemma did not previously raise the issue, the court incorrectly concluded it had jurisdiction under section 1237.2 to consider the claim. Under section 1237.2, the trial court retains jurisdiction "to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction" only if "the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal." (§ 1237.2.) Lemma's appeal claimed errors in the

length of sentences imposed, not just the imposition or calculation of fines, penalty assessments, surcharges, fees, and costs.<sup>8</sup>

The Supreme Court has held on numerous occasions that a defendant may forfeit a constitutional or other right by failing to timely assert it. (*People v. McCullough* (2013) 56 Cal.4th 589, 593 (*McCullough*).) Section 1202.4, subdivision (d) provides that a trial court may consider a defendant's inability to pay when it increases the restitution fine in excess of the minimum.<sup>9</sup> The Supreme Court has held a defendant forfeits a challenge to the trial court's imposition of a fine that exceeds the minimum amount for failure to consider the ability to pay if the defendant did not object below. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 (*Nelson*).)

Unlike the defendant in *Dueñas*, Lemma concedes he did not object to the financial impositions at sentencing on the grounds that he was unable to pay, even though the court ordered payment of a restitution fine in excess of the minimum. Thus, Lemma has forfeited any request for reconsideration of his ability to pay the restitution fines. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [failure to object to imposition of restitution fine under section 1202.4 based on ability to pay led to forfeiture]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 (*Frandsen*) [defendant who failed to challenge assessments and restitution fine at sentencing forfeited argument on appeal].)

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<sup>8</sup> In a footnote in his supplemental letter brief, Lemma notes that the only relief sought in this appeal unrelated to *Dueñas* is a remand for sentencing reconsideration. While true, the originally-requested remand is not based on errors in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs, as required by section 1237.2.

<sup>9</sup> The minimum fine under section 1202.4 is \$300 for a felony conviction.

We also conclude Lemma has forfeited any challenge to the assessments and fees for failure to object to their imposition at sentencing. (See *Frandsen, supra*, 33 Cal.App.5th at pp. 1154-1155; see, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864, 868-869 [applying forfeiture to probation related costs and reimbursement of fees paid to appointed trial counsel]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853-854 [forfeiture rule applied to probation related fees]; *McCullough, supra*, 56 Cal.4th at pp. 596-597 [jail booking fee must be challenged in trial court or issue is forfeited]; *Nelson, supra*, 51 Cal.4th at p. 227.) Trial counsel's failure to object at Lemma's sentencing hearing forfeited Lemma's right to challenge on appeal the fines and fees imposed by the trial court.

#### DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.